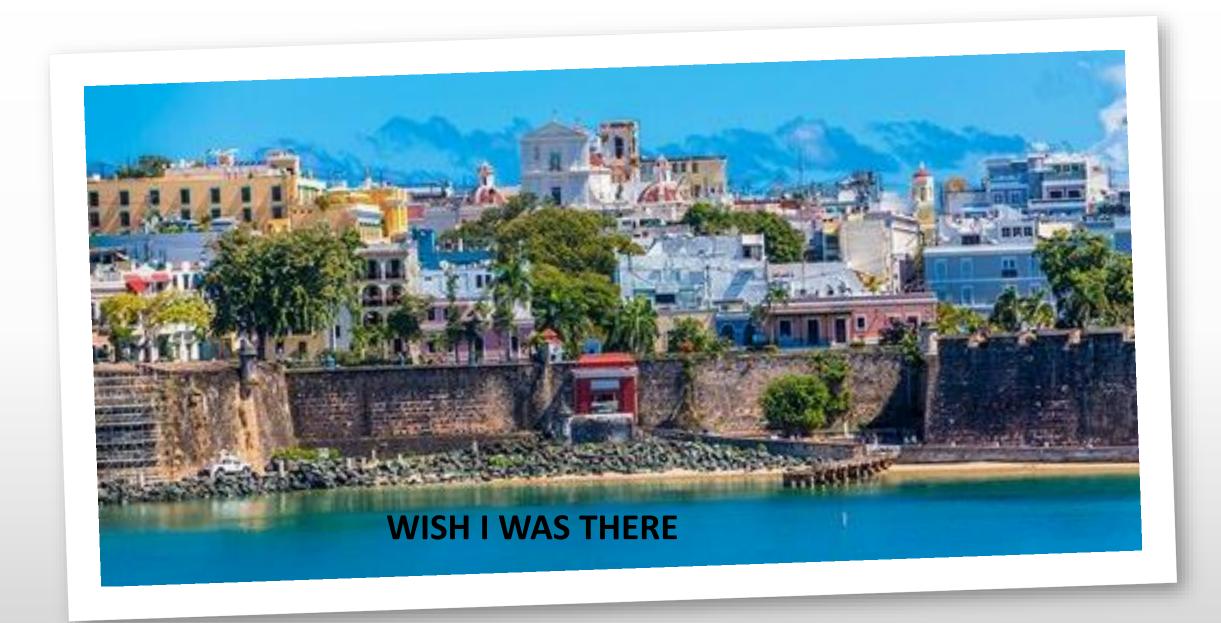
# CLE for the Bar of the U.S. District Court for the District of Puerto Rico

Professor Patrick Parenteau, Vermont Law School

Whiplash: Environmental Policy from Trump to Biden

**December 2, 2020** 



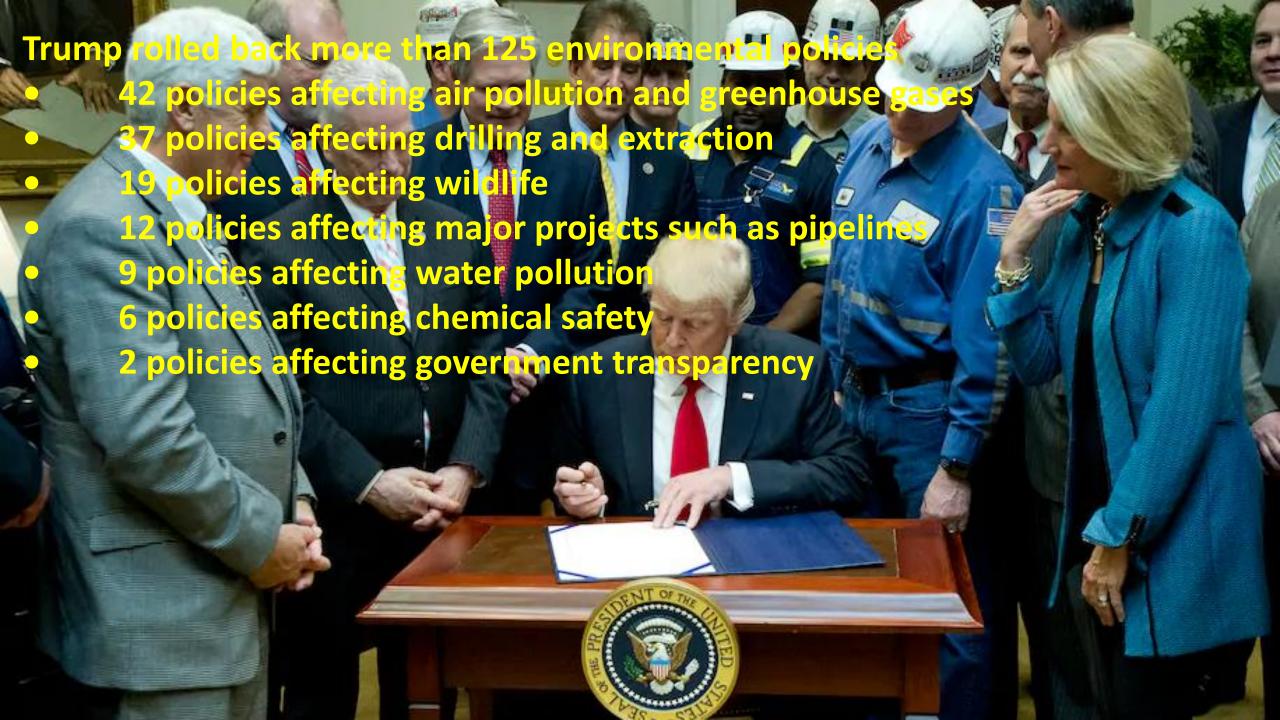
### Syllabus Part I

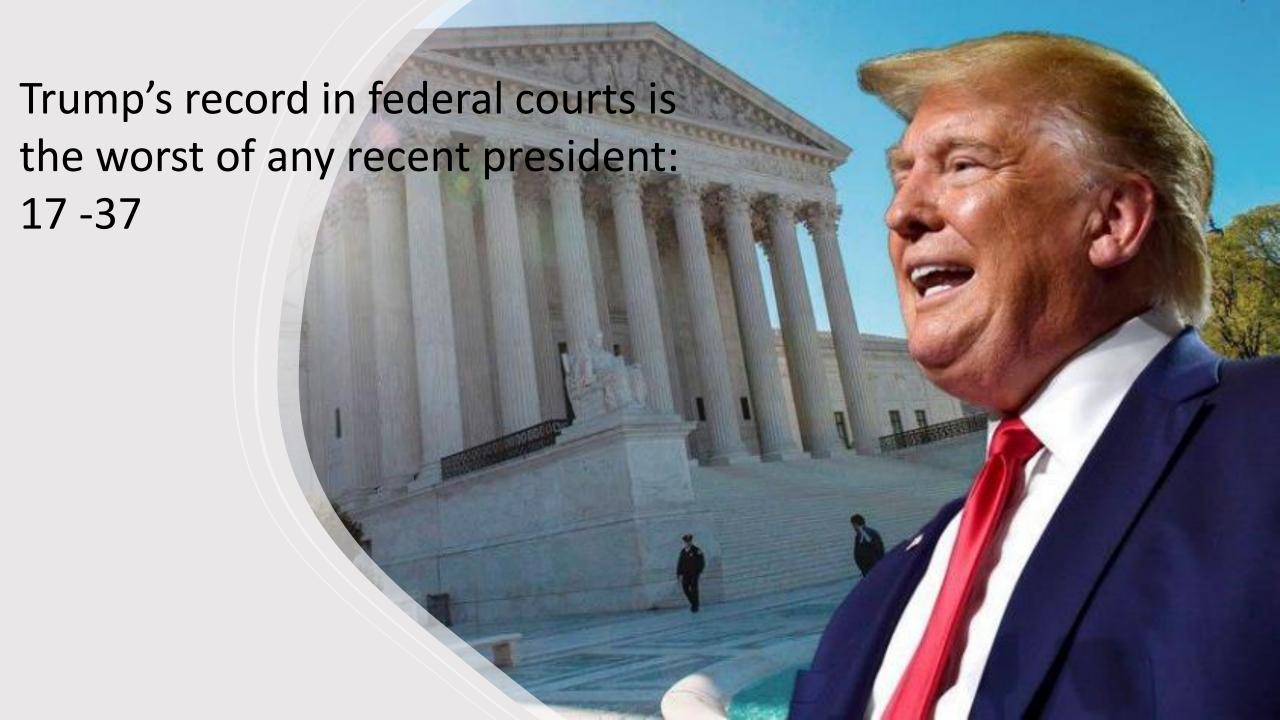
#### A. Clean Air Act

- GHG Rules for Powerplants
- Fuel Economy/Tailpipe Standards
- Methane Rules
- B. Clean Water Act
- Navigable Waters Protection Rule (AKA WOTUS)
- Water Quality Certifications
- Groundwater Discharges

### Syllabus Part II

- C. NEPA
- ➤ Revision of CEQ Regulations
- Litigation
- D. Endangered Species Act
- ➤ Revision of Implementing Rules
- Litigation
- E. Climate Change Litigation
- > Juliana v United States
- > Tort Claims against the Oil Companies













## SUPREME COURT ORAL ARGUMENT

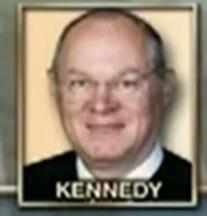






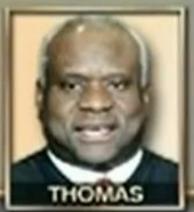










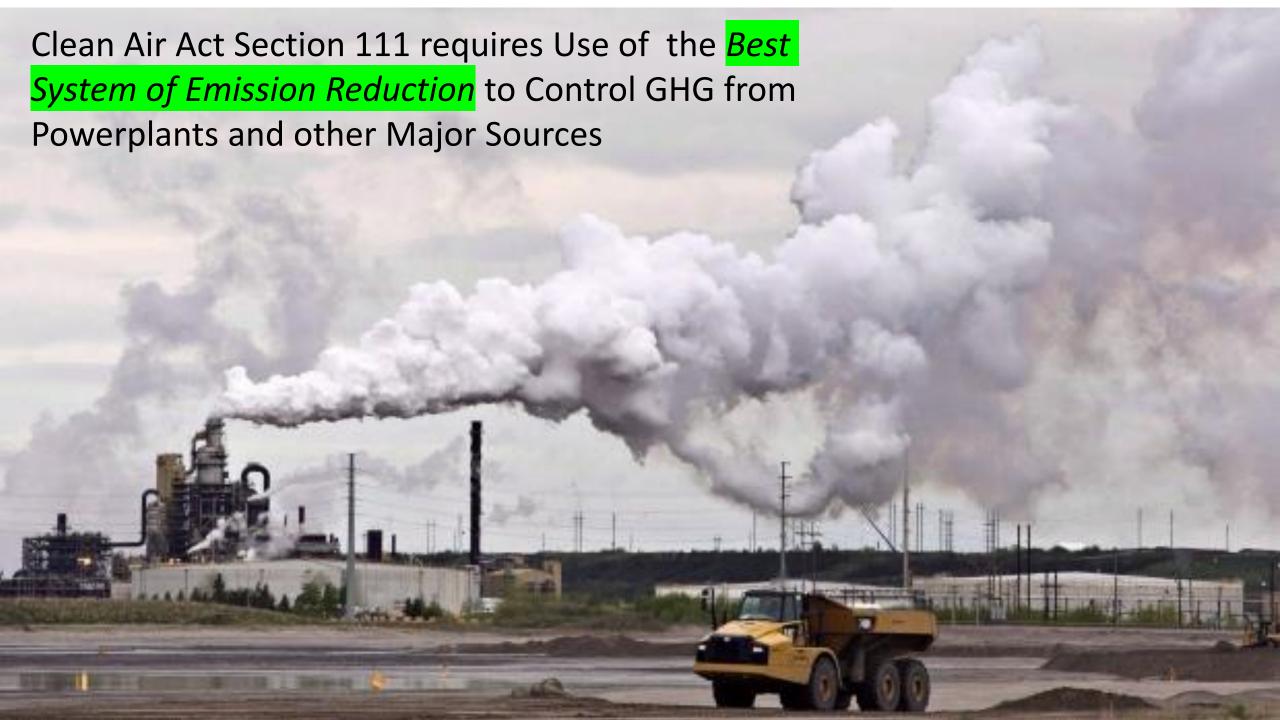


**GREENHOUSE GAS EMISSIONS & CLIMATE CHANGE** 

AEP vhttps://www.supremecourt.gov/opinions/10pdf/10-

C-SPAN c-span.org

174.pdf Connecticut



## **GHG** Emissions from Powerplants

In June 2020, the U.S. Environmental Protection Agency (EPA) finalized its so-called Affordable Clean Energy (ACE) rule. The ACE rule repeals and replaces the 2015 Clean Power Plan (CPP) which aimed to reduce carbon dioxide emissions from existing power plants by 30% below 2005 levels by 2030. The CPP established state-specific targets for reducing emissions from the electric power sector and required states to develop plans for achieving those targets. The ACE Rule takes a different approach, directing states to set standards of performance for individual power plants, and thus effectively allowing them to decide how much to cut emissions.

#### Problems with the Ace Rule

- 1. The ACE Rule does not set emission limits for powerplants or require states to achieve any specific reduction in GHG. Rather it provides a list of techniques that states may adopt to improve plant efficiencies. In the CPP, the EPA defined the BSER for carbon dioxide emissions from existing power plants based on three "building blocks," reflecting (1) heat-rate improvements at coal-fired power plants, (2) increased utilization of natural gas combined cycle units, and (3) increased use of renewable energy. The Ace rule eliminated blocks 2 & 3 because they are "outside the fence line."
- 2. The rule is expected to reduce cumulative national carbon dioxide (CO<sub>2</sub>) emissions by 0.1 percent between 2021 and 2050, based on data from EPA's Regulatory Impact Analysis. It is difficult to believe that this magnitude of emissions reduction is a sufficient regulatory response to the harms of greenhouse gases confirmed in EPA's endangerment finding. ACE would impose a regulatory cost on states and EGUs in exchange for few benefits. ACE would cause as many as 1,400 additional premature deaths each year by 2030.



Walker





Pillard



Millett



## Trump's Methane Rule Rollback Divides Oil and Gas Industry



























U.S. to Announce Rollback of Auto Pollution Rules, a Key Effort to Fight Climate Change







#### Navigable Waters Protection Rule

#### **Jurisdictional Waters**

Four categories of waters are federally regulated:

- •The territorial seas and traditional navigable waters,
- Perennial and intermittent tributaries to those waters that meet certain flow requirements,
- Certain lakes, ponds, and impoundments, and
- •Wetlands that abut jurisdictional waters

Non-Jurisdictional Waters

The final rule also details 12 categories of exclusions (i.e., features that are not "waters of the United States"), such as features that only contain water in direct response to rainfall (e.g., ephemeral features), groundwater, many ditches, prior converted cropland, and waste treatment systems.

#### Problems with the NWPR

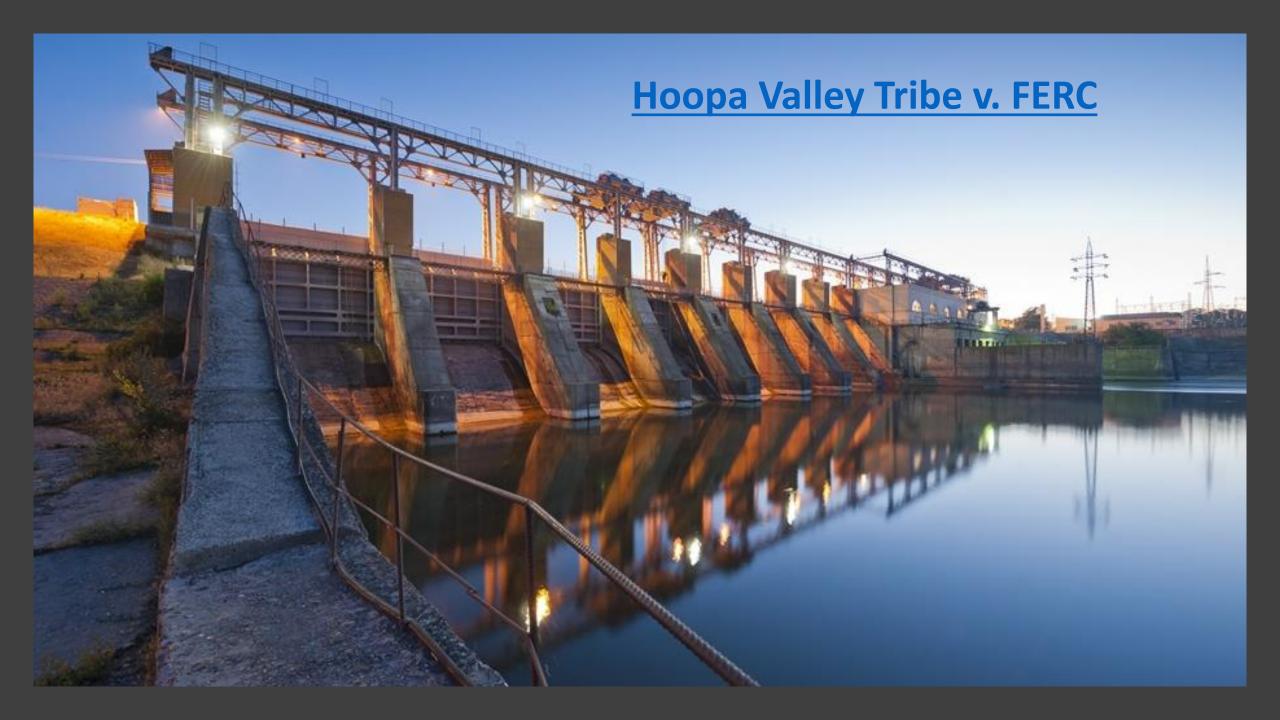
- Removes federal protection for over half the nation's wetlands
- Removes federal protection for 1/5th of the nation's streams
- EPA's Science Advisory Board says the rule is not based on sound science
- The rule rejects the "significant nexus test" adopted by ten Circuit Courts
- The economic analysis discounts the loss of protection for wetlands on the assumption the states will fill the gaps
- States may not fill the gaps; 26 states have laws specifying that regulations can be no stricter than federal





We hold that the statute requires a when there is a direct discharge from a point navigable waters or when there is the functional equivalent of a direct discharge.





## The Clean Water Act Section 401 Certification Rule



New York Attorney General James today joined a coalition of 21 attorneys general in filing a <u>lawsuit</u> <u>challenging the U.S. Environmental Protection Agency's (EPA) final rule unlawfully curtailing</u> <u>state authority under Section 401 of the Clean Water Act</u>. For more than three decades, the EPA has consistently acknowledged and respected that Section 401 provides states with broad authority to ensure that federally permitted projects do not harm water quality in their states. However, as directed by President Trump's <u>April 2019 executive order</u>, the EPA issued a final rule radically altering its water quality certification regulations to restrict state authority under the Clean Water Act.



## **NEPA Modernization**





"We just need to cut through all the pesky government red tape."



Twenty-Three Attorneys General File Lawsuit to Halt Reckless and Unprecedented Weakening of NEPA Regulations

California launches its 100th lawsuit against Trump administration

Green groups challenge Trump rollback of bedrock environmental law

Environment America joins lawsuit challenging NEPA rollback

Enviros to court: Trump 'cut every corner' on NEPA overhaul



### Problems with ESA Rule Revisions

- Removes immediate protection from "take" for threatened species
- Requires consideration of costs before listing a species despite statutory command that such decisions are to be based "solely" on biological factors
- Redefines "foreseeable impacts" to limit consideration of climate change
- Narrows the scope of federal actions subject to the consultation requirement
- Makes it harder to designate critical habitat not currently occupied but necessary for recovery











### **Elements of Failure to Warn Claim**

- Did the defendant know of the danger presented by the product it promoted?
- Did the defendant hide the danger from its customers, regulators and the public?
- Did defendant cause or contribute to damage to plaintiffs property or economic livelihood?
- Was the harm to plaintiff foreseeable?
- Can the court fairly apportion the damages attributable to defendant's contribution?

## Failure to Warn Cases

- Cigarettes
- Lead Paint
- Glyphosate
- Asbestos
- MBTE
- PFOA

## QUESTIONS?

